

TRASHING *THE GERMAN ADVANTAGE*

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The conduct of civil litigation in Continental legal systems differs markedly from the Anglo-American tradition, although the differences should not obscure the fundamental similarity that both are adversary systems. In Continental systems lawyers for the litigants play important roles in formulating their clients' positions, nominating lines of factual inquiry, and overseeing the work of the court.¹ The greatest difference between the two traditions is the allocation of responsibility for identifying and investigating disputed issues of fact. In our procedure, the adversaries gather potential proofs in out-of-court pretrial discovery proceedings; and if the case resists settlement, the adversaries select and adduce proofs at trial. In Continental practice, by contrast, the court determines the sequence for investigating issues of fact; and, subject to adversary oversight, the court examines witnesses. Our distinction between pretrial and trial is unknown; rather, a European court investigates and adjudicates in discontinuous hearings, as many as the case requires.

In *The German Advantage*² I had three objectives. First, I wanted to make available a concise account of the main attributes of the Continental system that I know something about, the West German. Sometimes even the first principles of German procedure take Anglo-American audiences by surprise, although there is a large English-language literature on the subject (not to mention the vast corpus of German-language reports, treatises, and scholarly monographs surrounding the German code of civil procedure). I came to suspect that the literature was perhaps too large and scattered, and that a work of summary might fill a need. Accordingly, in a 43-page article, I undertook to describe the salient features of German civil procedure.

Beyond description, the article had the further purpose of highlighting the main advantages that arise from the German tradition of judicial control of fact-gathering: (1) By having the trier control the sequence of fact-gathering, the Germans are able to minimize unproductive investigation; in contrast, our division between pretrial discovery and trial pro-

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¹ The importance of counsel in the judge-dominated German system is a recurrent theme in Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 & n.4, 834-35, 841-42, 844-45 (1985) [hereinafter *The German Advantage*].

² *Id.*

vides incentives for excessive search.³ (2) By having the court examine the witnesses, the Germans prevent lawyers from having pretrial contact with nonparty witnesses, thereby precluding the coaching of witnesses that disfigures our civil justice.⁴ (3) The Germans employ neutral experts whose duty is to aid the court in finding the truth, in contrast to the litigation-biased expert witnesses that American lawyers recruit and pay to bolster preordained results.⁵

Having pointed to these advantages, the article warned that the greater responsibility of the bench for the conduct of civil proceedings in Germany entails risks of its own. Thus, the article discussed how the twin safeguards of a professionalized judiciary⁶ and a stunningly liberal right of appellate review⁷ provide the needed correctives.

My third objective in *The German Advantage* was to direct attention from a comparative perspective to the rise of American managerial judging.⁸ Complex litigation has required us to superimpose upon our lawyer-driven procedure a growing component of judicial management, including judicial involvement in identifying issues, promoting settlement, and sequencing investigation. These techniques are strongly reminiscent of German-style procedure. I observed that it is awkward to reconcile our new practice of managerial judging with our traditional theory of party domination of fact-gathering.⁹ I cautioned that we have not yet adequately addressed the need to devise safeguards appropriate to the burgeoning judicial power over the pretrial process.¹⁰

The German Advantage has become the foil for the paper¹¹ that appears in the previous pages of this journal. On a host of points, the *Critique* seriously misrepresents both the substance of *The German Advantage* and the reality of German procedure. Accordingly, this is a paper whose sad errand is to show how the *Critique* has distorted *The German Advantage*. I cannot at reasonable length chase down every twisted meaning or reply to every tweak, but I do undertake in this paper to respond to enough of the *Critique* to show that it is thoroughly untrustworthy.

The scathing tone of the *Critique* will have alerted readers to the likelihood that something is amiss. Much of the *Critique* is commonplace adversarial counterpunching, but longish portions purport to use

³ *Id.* at 830-32.

⁴ *Id.* at 833-35.

⁵ *Id.* at 835-41.

⁶ *Id.* at 848-55.

⁷ *Id.* at 855-57.

⁸ *Id.* at 825, 841, 858-66.

⁹ *Id.* at 825, 865-66.

¹⁰ *Id.* at 861.

¹¹ Allen, Köck, Reichenberg & Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U.L. REV.— (1988) [hereinafter *Critique*].

German-language materials to discredit conventional views about German civil procedure. It is remarkable, therefore, that Ronald Allen, the *Critique's* mastermind, is illiterate in German. He engaged a couple of German-speaking students who were passing through Northwestern Law School last year to serve as seeing-eyes for the German sources, and he affiliated them as co-authors. Experienced scholars understand why that is an imprudent method of conducting research in comparative law.¹²

I. THE BIG CASE

"Langbein limits his comparison to the 'traditional bipolar lawsuit in contract, tort, or entitlement,'" the *Critique* asserts, "and explicitly excludes from the analysis the 'Big Case.'" ¹³ I said no such thing. The passage that the *Critique* misrepresents appears in the introduction to *The German Advantage*, where I explain that although latter-day American managerial judging originated in complex cases and marks a point of convergence between the two traditions, my discussion will not be limited to managerial judging. The passage reads in full:

I should emphasize, however, that the main concern of this article is not the sprawling Big Case, but the traditional bipolar lawsuit in contract, tort, or entitlement. The Big Case is testing and instructive but quantitatively unimportant. Ordinary litigation is the place to compare and to judge civil procedural systems.¹⁴

In the concluding portion of *The German Advantage* that is devoted to American managerial judging, I discuss how the Big Case techniques enshrined in the *Manual for Complex Litigation*¹⁵ have seeped into the federal procedure for ordinary litigation,¹⁶ and I explain why the *Manual* looks "proto-Germanic" in the eyes of the comparative lawyer . . .¹⁷

Despite my recurrent attention to the Big Case, the *Critique* accuses me of "explicitly exclud[ing] from the analysis the 'Big Case.'" ¹⁸

¹² The more central unreadable sources are to an inquiry, the less likely that someone who cannot read them is fit to conduct that inquiry. A well-motivated scholar, lacking the language that a project requires, might associate himself with a master of the subject—in this instance, for example, with a seasoned authority on German civil procedure. But for reasons that will be clear enough to anybody who reads this rebuttal, no authority on German procedure would have been willing to subscribe to the misrepresentations that the *Critique* presents.

¹³ *Critique*, *supra* note 11, text at note 12; *see also id.*, text following note 17 (The "argument purports to be limited to the 'little case,' whereas in fact it is more telling if directed to the Big Case.").

¹⁴ *The German Advantage*, *supra* note 1, at 825.

¹⁵ *MANUAL FOR COMPLEX LITIGATION* (5th ed. 1982).

¹⁶ *The German Advantage*, *supra* note 1, at 858-59.

¹⁷ *Id.* at 859.

¹⁸ *Critique*, *supra* note 11, text at note 12. Elsewhere in *The German Advantage* I cautioned readers against confining its message to the Big Case:

In emphasizing the Big Case as the origin of managerial judging in American procedure, I do not mean to imply that I think that managerial judging ought to be confined there. To the contrary, I agree with the point that Hein Kötz has long asserted [citation omitted], that the

II. COACHING WITNESSES

Why does the *Critique* attribute to me the palpably spurious view that my argument is "limited to the 'little case' "?¹⁹ A partial answer is that the *Critique* wishes to trivialize, and thus sidestep, one of the main contentions of *The German Advantage*.

The German Advantage emphasizes the profound enhancement in accuracy that the German system achieves by having the court rather than the adversaries conduct the initial examination of nonparty witnesses.²⁰ German procedure operates without any trace of the partisan preparation of witnesses that is so endemic to our legal system. I quoted a little of Judge Jerome Frank's famous warning about the coaching of witnesses in American practice.²¹ The *Critique's* authors denigrate Judge Frank.²² I might as easily have pointed to Judge Marvin Frankel's recent account:

[E]very trial lawyer knows that the "preparing" of witnesses may embrace a multitude of other measures, including some ethical lapses believed to be more common than we would wish. The process is labeled archly in lawyer's slang as "horseshedding" the witness . . . [T]he process often extends beyond helping organize what the witness knows, and moves in the direction of helping the witness to know new things.²³

There can be no principled defense of coaching, and the *Critique* offers none. Testimony that is rehearsed and molded by adversaries is materially less trustworthy than testimony that is free of such influences. However, the *Critique* contrives to wish away some of the force of this powerful truth by ascribing to me the view that American procedural shortcomings are characteristic of "little cases," then purporting to wonder whether "little cases" are lucrative enough to induce lawyers to spend time coaching witnesses.²⁴

The *Critique* returns to the subject of coaching a few pages later, employing a recurrent stratagem: demanding nonexistent empirical data and implying that only scholars who conduct social-scientific empirical investigation can speak to issues of comparative civil procedure. The "criticisms [in *The German Advantage*] of the coached witness . . . are difficult to appraise," says the *Critique*, "because [the] argument is somewhat speculative. No data concerning the extent of the problem are pro-

German advantage in civil procedure is at its greatest in the Small Case, where the costliness of adversary fact-gathering is intolerable.

The German Advantage, *supra* note 1, at 862 n.138.

¹⁹ *Critique*, *supra* note 11, text following note 17. Despite the quote marks on 'little case,' the term is not mine.

²⁰ *The German Advantage*, *supra* note 1, at 833-35.

²¹ *Id.* at 833 (quoting J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 86 (1949)).

²² The *Critique* does so in a shabby footnote: *Critique*, *supra* note 11, at note 14.

²³ M. FRANKEL, PARTISAN JUSTICE 15 (1980).

²⁴ *Critique*, *supra* note 11, text preceding note 16.

vided, nor is any reason given why these assertions should be accepted on faith."²⁵ There is, of course, no extant data on either the extent of coaching or the levels of prevarication achieved. It could as easily be argued that in designing rules of criminal procedure we need not worry about convicting the innocent, since nobody has adequate data on how many innocent are convicted. The *Critique's* authors do not deny the point that is emphasized in *The German Advantage*—that our system of partisan preparation of witnesses facilitates coaching. Rather, they employ a debater's trick (Where's your unobtainable data on frequency?) in order to conceal the force of the point. I reiterate: (1) Judges Frank and Frankel are correct that American trial lawyers persistently coach witnesses; (2) coaching is profoundly truth-defeating; and (3) the German system is devoid of it.

The *Critique's* attachment to empiricism is skin-deep. The *Critique's* authors demand empirical scholarship from others, but feel free to employ nonempirical argumentation when it suits their fancy. Thus, in a further try at wriggling off the hook on the matter of coaching, the *Critique* asserts that "the German system may be moving toward ours . . ."²⁶ This statement is an egregious error, and it is instructive to see how the *Critique* got there.

In *The German Advantage* I explain why a German lawyer will virtually never . . . have occasion for out-of-court contact with a witness. Not only would such contact be a serious ethical breach, it would be self-defeating. "German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel or who have consorted unduly with a party."²⁷

The passage quoted within this extract comes from a great English-language mini-treatise on German civil procedure written by Benjamin Kaplan, Arthur T. von Mehren, and Rudolf Schaefer, which appeared in 1958.²⁸ In my supporting footnote, I note that the distinguished German professor of comparative law, Hein Kötz, spoke in a similar vein in an article published in 1982.²⁹ My footnote discloses, as convention requires, that language quoted by Kötz derived from the 1957 version of the German Bar Association's ethical standard.³⁰

The *Critique* responds to this material by ignoring the context in

²⁵ *Id.*, text at note 68 (footnote omitted). The *Critique's* note 68 faults me for not consulting "psychological literature on memory," while confessing that the literature is "not perfectly consistent" on the proposition that the *Critique* wants to extract from it—that is, that witnesses are not "easily manipulated by lawyers." *Id.*

²⁶ *Critique*, *supra* note 11, text following note 79.

²⁷ *The German Advantage*, *supra* note 1, at 834 (quoting Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1201 (1958))[hereinafter KAPLAN-VON MEHREN].

²⁸ KAPLAN-VON MEHREN, *supra* note 27, at 1443.

²⁹ *The German Advantage*, *supra* note 1, at 834 n.33.

³⁰ *Id.*

which Kötz mentioned the German Bar Association's ethical standard—namely, the insistence by this great modern German authority that German lawyers continue to avoid pretrial contact with witnesses today, just as in the day of the Kaplan-von Mehren-Schaefer article.³¹ The *Critique* notices that a later version of the German Bar Association ethical standard changes some of the wording of the 1957 provision that allows out-of-court contact with witnesses in cases of unusual necessity.³² The *Critique* then declares “these revisions” to be evidence “that the German system may be moving toward ours”³³

Ever ready to fault others for the lack of real world empirical data, the *Critique* is unable to point to a single instance in which an out-of-court contact has occurred between a nonparty witness and a German lawyer. And if one could be found, it would be noteworthy for its extreme rarity. Nevertheless, the authors discern that the Germans are “moving toward” the American practice. The truth is (for the reasons explained in *The German Advantage* as well as in the earlier Kaplan-von Mehren-Schaefer and Kötz articles) that German procedure strongly discourages out-of-court contact between lawyers and witnesses. Coaching is American, not German. In denying these points, the *Critique* misrepresents the reality of both legal systems.

III. JUDICIAL CONDUCT OF INVESTIGATION

The German Advantage summarizes the allocation of responsibility for investigating disputes of fact in German procedure:

Unlike an American complaint, . . . the German [complaint] proposes means of proof for its main factual contentions. The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The defendant's answer follows the same pattern. It should be emphasized, however, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work of the judge.³⁴

The supporting footnote refers readers to the Kaplan-von Mehren-Schaefer article for further “English-language discussion of this point” that digging for facts is primarily the work of the judge, since the phenomenon “is so striking to those of us bred in the Anglo-American tradition.”³⁵

³¹ *The German Advantage*, *supra* note 1, at 834 n.33 (quoting Kötz, *Civil Litigation and the Public Interest*, 1 CIV. JUST. Q. 237, 241 (1982)).

³² *Critique*, *supra* note 11, text at note 77.

³³ *Id.*, text following note 79.

³⁴ *The German Advantage*, *supra* note 1, at 827.

³⁵ *Id.* at 827 n.12.

The *Critique* insists, however, that the German judge's role "does not include anything like 'digging for facts.'" ³⁶ In drawing this conclusion, the *Critique* confuses the elementary difference, captured in the paragraph from *The German Advantage* reproduced above, between identifying sources and investigating matters of fact. "Rather than 'digging for facts,'" says the *Critique*, "the court is bound by what the parties advance."³⁷ The authors ignore reality in suggesting that adversary control of the scope of the lawsuit undercuts the court's responsibility to investigate disputed facts. English-language readers should consult the recent account by Kötz, which notes some of the investigative steps open to the judge, such as gathering official files and appointing an expert. Kötz summarizes the matter thus: "In other words, the court may look for the truth beyond the confines of the evidence offered by the parties."³⁸ (Judicial responsibility for examining witnesses, the other aspect of the German system in which it is helpful to understand that "digging for facts is primarily the work of the judge," is discussed in Part V below.)

No amount of word play in the *Critique* should obscure the simple truth that in German civil procedure partisan nomination yields to judicial investigation of the proofs.

IV. SURPRISE

The German Advantage discusses the judicial responsibility for developing the proofs. The article emphasizes two features that are noteworthy from the comparative standpoint, and the *Critique* denies neither. First, the court determines the sequence in which it will investigate the issues.³⁹ Second, the court examines any witnesses, subject to adversary oversight and supplementary questioning.⁴⁰

From the standpoint of efficiency, an important attribute of German procedure is the discontinuous hearing system, which limits investigation to the most important issues still unresolved. The court ranges over the case, "constantly looking for the jugular—for the issue of law or fact that might dispose of the case."⁴¹ In a crucial passage that the *Critique* pretends to rebut, *The German Advantage* explains that the danger of surprise inherent in the Anglo-American pretrial/trial distinction prevents us from organizing fact-gathering in a comparable fashion:

Part of what makes our discovery system so complex is that, on account of our division into pretrial and trial, we have to discover for the entire case. We investigate everything that could possibly come up at trial,

³⁶ *Critique*, *supra* note 11, text preceeding note 82.

³⁷ *Id.*, text at note 85.

³⁸ Kötz, *supra* note 31, at 239.

³⁹ *The German Advantage*, *supra* note 1, at 830-32.

⁴⁰ *Id.* at 834-35.

⁴¹ *Id.* at 830.

because once we enter the trial phase we can seldom go back and search for further evidence. By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized.⁴²

The *Critique* replies that

Langbein is wrong on the law. There is a well developed body of law concerning surprise in the United States, and "the potential for surprise witnesses who cannot be rebutted in time" is not terribly great. . . . In most jurisdictions, a continuance of the trial or hearing will be granted, or on occasion the witness's testimony excluded.⁴³

This assertion is nonsense. The cases cited⁴⁴ in support of it deal with the dramatically different matter of pretrial misbehavior, such as concealing or misdescribing a witness in violation of the discovery rules.

The existence of a remedy in misconduct cases is simply irrelevant to the concern about the structure of the discovery system that is stressed in the extract from *The German Advantage* reproduced above. Any civilized legal system provides a remedy for surprise by trick, but that remedy is for the extraordinary case. The usual way of preventing surprise in our civil procedure is, as the extracted passage from *The German Advantage* says, "to discover for the entire case." The structural problem of Anglo-American civil procedure results from what comparative lawyers call the principle of concentration.⁴⁵ We require the trial to be a single continuous event, as opposed to the series of discontinuous hearings employed in Continental adjudication. The crucial point that the *Critique* cannot controvert is that "once we enter the trial phase we can seldom go back and search for further evidence."⁴⁶ Unless the authors of the *Critique* wish to assert that an Anglo-American lawyer would face no obstacles in waiting until trial to conduct discovery (a course of conduct that would ordinarily amount to legal malpractice), their argument is specious.

⁴² *Id.* at 831 (footnote omitted).

⁴³ *Critique*, *supra* note 11, text following note 65.

⁴⁴ *Id.*, at n.67.

⁴⁵ See the brilliant exposition of this point by Arthur T. von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, 2 EUROPAISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 361 (N. Horn ed. 1982); see *id.* at 362-64 for discussion of the danger of surprise as the driving force behind our discovery system.

⁴⁶ *The German Advantage*, *supra* note 1, at 831. The passage from which this language is taken is quoted in full, *supra* text and note 39.

V. EXAMINING WITNESSES

On the subject of the German court examining witnesses, the *Critique* reverses field. Necessarily admitting that the court does the examining (which is, of course, a main component of what was meant when I said that "[d]igging for facts is primarily the work of the judge"⁴⁷), the *Critique* complains that the court does the job badly. The authors lament that "unfortunately the German system has not been subjected to the intense scrutiny of trained empiricists at anywhere near the level at which Americans have scrutinized their own system." Nevertheless, they exult in having "discovered one remarkable study of the hearing process in a German civil court, and its implications are troubling."⁴⁸

The "remarkable study" is a paper by Beatrice Caesar-Wolf, published in an obscure journal,⁴⁹ that contains some verbatim extracts from the examination of two witnesses in a single hearing. Also reprinted is the judge's succinct official summary of the essentials gleaned from the examination. The *Critique*, after quoting some of this material, announces: "As Caesar-Wolf observed, the judge has created the testimony he wanted, fashioning very definite testimony out of considerably more ambiguous initial testimony."⁵⁰ I urge readers to reexamine the portion of the *Critique* in which the authors republish the verbatim,⁵¹ in order to judge for themselves whether that damning description even remotely captures the event. A better description of the dialogue is that it is an innocuous exchange in which a judge encourages a witness to be more precise by probing the circumstances that the witness volunteers.

This "remarkable study" is indeed remarkable—for the audacity of basing supposedly empirical conclusions upon a single instance. What Ronald Allen and his associates call empiricism is what empiricists call

⁴⁷ *The German Advantage*, *supra* note 1, at 827; see *supra* note 31, where this passage is quoted in context.

⁴⁸ *Critique*, *supra* note 11, text following note 109.

⁴⁹ Caesar-Wolf, *The Construction of 'Adjudicable' Evidence in a West German Civil Hearing*, 4 TEXT 193 (1984) (on file with the NORTHWESTERN UNIVERSITY LAW REVIEW). Neither the Northwestern University nor University of Chicago library systems could produce the journal; the *Critique* authors supplied a photocopy.

⁵⁰ *Critique*, *supra* note 11, text following note 114. Actually, Caesar-Wolf grinds a very different axe from the one that the *Critique* seeks to wield. Judicial fact-finding presupposes that there is an objectively correct version of "the facts"—that is, what actually happened. Caesar-Wolf disputes that premise:

We do not share the empiricist notion underlying most psychological studies of witness testimony, according to which 'truth' is the exact mirror of some external reality in the sensory perception, memory and verbal reproduction of the witness. Therefore, we are not interested in the question central to these psychological studies of whether the testimony brings to light or distorts the original events in question.

Caesar-Wolf, *supra* note 49, at 194 (footnote omitted). The authors of the *Critique* do not endorse this rubbish, yet they borrow language and conclusions that Caesar-Wolf formulated in supposed demonstration of her nihilist view of fact-finding.

⁵¹ *Critique*, *supra* note 11, text at notes 113-14.

sampling error. Thousands of German civil hearings occur every day, and by law⁵² every one is open to the public. An author who relies upon a sample of one when a sample of millions is available is not engaged in empirical research as the term is ordinarily understood.

Equally remarkable is that the *Critique* disregards the adversarial safeguard, discussed in *The German Advantage*, designed to deter judicial arbitrariness in examining a witness or in recording witness testimony:

Witness testimony is seldom recorded verbatim; rather, the judge pauses from time to time to dictate a summary of the testimony into the dossier. The lawyers sometimes suggest improvements in the wording of these summaries, in order to preserve or to emphasize nuances important to one side or the other.⁵³

Lawyers commonly participate in summarizing witness testimony. I have observed it repeatedly in German courtrooms. English-language readers should consult the Kaplan-von Mehren-Schaefer article for a comparable account, which concludes that "the witness or the lawyers may suggest changes [in the judge's suggested summary]. If there should be objection to the summary as the court finally formulates it, the objection would also be entered in the minutes, but this rarely happens."⁵⁴ The reason it rarely happens is that the judge has every incentive not to misrender party testimony in circumstances in which his misconduct would be entered in the record for appellate review. As is so often the case in German procedure, the presence of adversaries, coupled with liberal appellate review, deters misconduct. The failure of counsel to object to what Caesar-Wolf treats as a misrendering of the witness's testimony strongly suggests that the affected party did not view the testimony as misrendered.

The portion of the *Critique* concerning examination of witnesses concludes by castigating German civil procedure for "the elimination of troubling lapses in the witness' memory and . . . suppressing data inconsistent with the judge's conclusions. It is no wonder, then, that the appellate process can be swift and efficient if it only considers the material presented to it by a single advocate—in this case, the judge."⁵⁵ We have in this purple passage a triple distortion: (1) the fallacy of basing deviant conclusions about the operation of a foreign procedural system upon a one-in-millions sample; (2) the refusal to mention, much less give due weight to, the adversary safeguards that strongly discourage the abuses that the *Critique* treats as normal; and (3) the claim that only the first-instance judge may shape the dossier, whereas in truth counsel for the

⁵² Gerichtsverfassungsgesetz (Court Organization Code) § 169 (court proceedings are public).

⁵³ *The German Advantage*, *supra* note 1, at 828.

⁵⁴ Kaplan-von Mehren, *supra* note 27, at 1236 (footnote omitted) (citing Zivilprozessordnung) (Code of Civil Procedure) § 162.

⁵⁵ *Critique*, *supra* note 11, text following note 119.

affected parties have ample opportunity to shape the record and to preserve objections to it.

VI. THE EXOGENOUS AGENDA

The book review that faults an author for not having written the book that the reviewer would have written is a staple. The authors of the *Critique* have dipped into that genre to fault *The German Advantage* for not conducting a comparative study of the rules of privilege and fishing.

A. Privileges

In describing the sources of dispatch in German civil procedure, I observed in *The German Advantage* that the German system "functions without the main chapters of our law of evidence, those rules (such as hearsay) that exclude probative evidence for fear of the inability of the trier of fact to evaluate the evidence purposively."⁵⁶ Accordingly, "evidentiary shortcomings that would affect admissibility in our law affect weight or credit in German law."⁵⁷ Solely as a qualification to this point, I remarked that "German law exhibits expansive notions of testimonial privilege, especially for potential witnesses drawn from the family."⁵⁸

The *Critique* faults my article for not exploring the German law of privilege more fully. The *Critique* describes some of the rules and concludes that "without more careful study of [the German law of privilege] in practice we are unable to say whether it is a 'superior' methodology or whether it is as Byzantine as it seems."⁵⁹ The quotation marks around the word "superior" imply that I called the German privileges "superior," whereas in truth I said no such thing. The *Critique* refutes its own invention. The *Critique* is characteristically truculent and one-sided in calling the German law of privilege "Byzantine" and denouncing it for impeding investigation (which, of course, it is meant to do), without acknowledging the admirable purposes that motivate rules of privilege, especially those affecting spouses and family members: the promotion of familial intimacy and professional trust.

The important point about the rules of privilege for present purposes is that they bear no intrinsic relationship to the main subject of *The German Advantage*, which is the comparison of lawyer-driven versus judge-driven fact-gathering. American law has many privileges, although fewer than German law. The scope that a legal system assigns to privileges for prized relationships is a relatively autonomous issue. In principle, for example, either the Germans or the Americans could adopt the

⁵⁶ *The German Advantage*, *supra* note 1, at 829.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Critique*, *supra* note 11, text following note 133.

other's rules of privilege without making any other alterations in their respective procedural systems.

B. Fishing

A similar line of reasoning, clearly set forth in *The German Advantage*, led me to exclude from the article the subject of "fishing" for evidence. German civil procedure imposes higher standards of relevance in identifying the evidence to be gathered than does the American procedure. Hence, the German consensus is hostile to fishing. The *Critique* is hostile to the German position.⁶⁰ There are important values on both sides of the issue. American-style fishing is costly and disruptive; it lends itself to abuse, especially because we have been unable to attach cost sanctions to anything but the most egregious misuses. On the other hand, very broad discovery enriches the proofs in some cases.

Germans are not alone in thinking that Americans have got the balance wrong. The English are as hostile to fishing as the Germans.⁶¹ Distinguished American jurists have also voiced disquiet. Justice Powell's dissent from the 1980 amendments to the Federal Rules of Civil Procedure illustrates the depth of the concern. "The present Rules . . . invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds. . . . One must doubt whether empirical evidence would demonstrate that untrammelled discovery actually contributes to the just resolution of disputes."⁶²

The German Advantage is about the virtues of having judges rather than lawyers conduct whatever fact-gathering the system permits. Accordingly, *The German Advantage* explains why the debate about fishing bears no integral relation to the great divide between Anglo-American and Continental procedure: "The choice between adversarial and judicial conduct of fact-gathering need not correlate strongly with the level of search achieved in a legal system. Factors unrelated to that choice, such as the clarity of the substantive law or the attitude toward fishing, will influence the levels of search."⁶³ The *Critique* ignores this straightforward account of why the article is not devoted to the topic, while delivering a one-sided endorsement of our hugely controversial American practice.

⁶⁰ *Id.*, text at notes 141-46.

⁶¹ See generally, J. LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* (1982), which criticizes the English system but admits that the English decision to protect "the peace and privacy of non-parties" rests "on grounds of supervening social policy"; and that English restrictions on oral depositions suggest "that economizing on time and money has occupied a high place in the English scheme of priorities." *Id.* at 9.

⁶² 446 U.S. 997, 999 (Powell, J., dissenting, joined by Justices Stewart and Rehnquist).

⁶³ *The German Advantage*, *supra* note 1, at 847.

VII. EXPERTS

Experts help courts draw inferences based upon specialized knowledge—for example, inferring speed from skid marks or paternity from genetic evidence. In any legal system, courts will rely upon expert assistance in evaluating such evidence. Continental legal systems diverge sharply from ours on how to select and instruct experts. In our system, adversary selection and instruction of partisan experts is the overwhelmingly dominant pattern. In Continental systems, including the German, judicial control of fact-gathering leads to court selection and instruction of neutral experts.

The German Advantage minces no words about which is the better approach on this matter. An expert hired to buttress a preordained position is engaged more in advocacy than in truth-seeking. Advocacy has important virtues, which is why German procedure makes liberal provision for adversary participation in the system of selection, instruction, and examination of neutral experts. But because advocacy is intrinsically biased, it is no substitute for dispassionate scientific evaluation. "Short of forbidding the use of experts altogether," *The German Advantage* laments, "we probably could not have designed a procedure better suited to minimize the influence of expertise."⁶⁴

A. German Disdain

Because neutral expertise is central to German civil procedure, the subject has given rise to practical treatises and scholarly literature. The *Critique's* authors have rummaged through this material in an effort to discredit the hugely successful German system. Their discussion is, once again, distorted and error-riddled, but it is important to begin with a different point. *In all the German literature that these combative authors reviewed, they could not find one word of comparative praise for the Anglo-American system.* They could not find one proponent of replacing neutral expertise with an American-style clash of partisans. Knowledgeable German jurists view our system of party-biased expertise with a mixture of astonishment and contempt. Like Sherlock Holmes' dog that did not bark, the dearth of German support is evidence that the *Critique* is not telling a straight story. I turn now to some particulars of the *Critique's* handling of expertise.

B. Adversary Safeguards

The *Critique* neglects to disclose that *The German Advantage* pays particular attention to how the German Code of Civil Procedure has designed the system of neutral expertise to protect the interests of litigants. *The German Advantage* explains that the selection process, while

⁶⁴ *Id.* at 836.

emphasizing scientific or professional merit, entails consultation with the parties about potential experts.⁶⁵ The article describes how the parties may participate in the court's framing of questions for the expert. It discusses the parties' opportunities to examine the court-appointed expert, to confront him with the views of adversary-selected experts, to have the court-appointed expert's report supplemented, and otherwise to challenge the report.⁶⁶ In explaining how the system guards against aberration, the article concludes:

When, therefore, a litigant can persuade the court that an expert's report has been sloppy or partial, that it rests upon a view of the field that is not generally shared, or that the question referred to the expert is exceptionally difficult, the court will commission further expertise.⁶⁷

The *Critique* is relentless in neglecting the ordinary incentives that encourage thoroughness and moderation in the rendering of expertise. The authors write: "Experts . . . have little incentive to report those views that would undermine their own conclusions."⁶⁸ For "little," I would substitute the word "every." An expert who concealed contrary authority would invite exactly that kind of adversary rebuttal that the German system of neutral expertise so carefully preserves.

C. *Delegating*

German legal scholarship can be notoriously conceptualistic. One of the pleasant old chestnuts of German theoretical discussion is the question of whether a judge who follows expert advice that he cannot fully comprehend is delegating his office. The *Critique* cites some of this stuff and scornfully concludes: "A system that is in substantial conflict over the proper use of expert witnesses is not in a position to instruct others on improvement."⁶⁹ The obvious point that the authors do not acknowledge is that the underlying problem arises not from any defect of German procedure, but from the intrinsic complexity of scientific knowledge. All legal systems require that the trier decide matters that turn upon bodies of scientific knowledge that the trier does not command. The Germans do the best that any system can with this dilemma. As the

⁶⁵ *Id.* at 837-38.

⁶⁶ *Id.* at 839-40. By contrast, I have elsewhere expressed reservations about the influence that German prosecutors appear to exercise in the selection of psychiatric experts in criminal proceedings, and on the consequent risk that the affected party may have difficulty "overcom[ing] adverse views of a court-appointed expert even if a contrary body of opinion exists." J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 76 (1977). The prosecutorial domination of the pre-trial investigation that characterizes German criminal procedure is without counterpart in German civil procedure. In civil procedure, as *The German Advantage* explains, the adversary balance seems well suited to protecting litigants' interests in the selection of experts.

⁶⁷ *The German Advantage*, *supra* note 1, at 840.

⁶⁸ *Critique*, *supra* note 11, text following note 193.

⁶⁹ *Id.* at text following note 169.

authors acknowledge in a footnote,⁷⁰ a German court is expected to probe an expert's report as best it can (aided, of course, by the adversary submissions of the parties); but when such probing gives no cause for disbelieving well-selected neutral expertise, the court may properly follow expert advice without purporting to master the body of scientific knowledge upon which the expert's report rests. The authors make no case for the view that the systematic bias of American adversary expertise—as opposed to German-style adversary vetting of neutral expertise—is a superior way to handle the problem.

D. Avoiding Expertise

The German Advantage remarks on the prominence of the expert in the German tradition, and the *Critique* wants to spar about that. The authors note that various respected German authorities recommend that the courts avoid using experts unless necessary.⁷¹ This is completely correct and completely tautological. If you don't have reason to call for an expert, you don't call for an expert.

E. Probing Expertise

The authors are schizophrenic about the level of probing of expertise that German courts undertake. They cite data indicating that the courts widely adopt expert findings and that only about ten percent of expert reports provoke "critical discussion."⁷² The authors bemoan this percentage but do not tell us why it is alarming. In a system that provides high levels of party safeguard in the selection and instruction of experts—the theme that I emphasize in *The German Advantage* and that the *Critique* persistently ignores—there is no obvious reason why nine out of ten expert reports should not be worth adopting without "critical discussion." Skid marks are skid marks, and blood types are blood types. It is a fallacy to suppose that expertise must routinely fall within the zone of contention.

A few paragraphs later, however, the authors take the opposite tack. They point excitedly to a German supreme court opinion that criticizes a lower court's handling of expertise in a medical malpractice case.⁷³ Rather than admit that the system is appropriately responsive to well-founded criticism of expert reports, the authors declare that the German supreme court "has recognized the problematic nature of 'neutral expertise.'"⁷⁴ Thus, the *Critique* takes an approach of damned-if-you-do-and-damned-if-you-don't. The authors castigate the German courts for being

⁷⁰ *Id.* at note 169 (discussing Bundesgerichtshof opinion of June 28, 1961).

⁷¹ *Id.* at text at notes 172-81.

⁷² *Id.* at text at note 185.

⁷³ *Id.* at text at notes 200-01.

⁷⁴ *Id.* at text following note 199.

inadequately critical of expertise, while treating a court opinion that is critical of expertise as a vote of no confidence in the system.

F. Science

To conclude their treatment of expertise, the authors descend to nihilism. Grandly lamenting that "Langbein does not address his epistemological views in this article," the authors nevertheless divine that "he seems to possess a view of science and expertise that entails the pursuit of rather simplistic 'objective' truth."⁷⁵ The epithet aside, that is exactly my view of science and expertise, and it is all but universally shared. Here is how the authors contest it:

Such a view is highly controversial, of course; in fact it is held by virtually no respectable scientist or philosopher of which we are aware. Rather, the contemporary conception of knowledge and its advancement is that both come from the competition among differing paradigms and modes of thoughts [citing, *inter alia*, Kuhn's, *The Structure of Scientific Revolutions*].⁷⁶

For all its affected learning, this passage embodies an elementary fallacy. It conflates the rarefied realms of scientific revolutions with the mundane world of settled knowledge. "Competition among differing paradigms" hardly captures the world of skid mark experts, poured concrete experts, ballistics experts, surveying experts, and the like. There is at any time a consensus on most matters of scientific knowledge; if there were not, it would be an act of extreme peril to drive a car, take an aspirin, buy a house, or eat a tuna sandwich. The law courts deal with ordinary human affairs, where, fortunately, the issues in dispute only exceptionally touch scientific revolutions. And when, as *The German Advantage* explains, a lawsuit does involve a field of unsettled knowledge, the German procedure promotes the hearing of discordant scientific views.⁷⁷

In a similar vein, the *Critique*'s authors purport to see no difference between the situation in which scientists disagree concerning unresolved questions of scientific knowledge, and the situation in which experts are paid to bolster opposing sides of a lawsuit. The authors approvingly quote another writer for the view that scientists "'already operate in an adversarial manner,'" with "'claims and counterclaims, arguments and counterarguments'"⁷⁸ But a world of difference exists between good faith scientific debate and the perverse incentives that arise when experts are paid to buttress preordained positions. In litigation, victory is winning for the moment; in scientific debate, where adjudication does not occur, reputational incentives press far more for accuracy. Money dis-

⁷⁵ *Id.* at text preceding note 203.

⁷⁶ *Id.* at note 204 and accompanying text.

⁷⁷ See *supra*, text accompanying notes 66-67.

⁷⁸ *Critique*, *supra* note 11, at 205 (quoting Loftus, *Ten Years in the Life of an Expert Witness*, 10 L. & HUM. BEHAV. 259-60 (1986)).

torts. That is why the convention is so strong that a scholar who, in a scholarly publication, advances a position that he first developed as a hireling, should disclose his former or continuing affiliation with his sponsor.

Indeed, for an object lesson in the corrupting power of adversary expertise, Ronald Allen need only look out the window to Northwestern's great medical school, where a professor of gynecology has just been indicted for perjury in the Dalkon Shield case. According to the New York Times report, the accused, who was paid \$277,000 in fees to consult and testify for the defendant, initially claimed to have conducted experiments in support of his testimony, then admitted he had not.⁷⁹ Exceptional though such a scandal undoubtedly is, it reveals a fundamental difference between American and German procedure. Such scandals do not happen in Germany, because court-appointed experts are not being paid to buttress litigants' positions.

VIII. JUDGES

Because the greater judicial responsibility for fact-gathering in German procedure necessarily imports greater judicial authority, the question arises whether the system contains appropriate safeguards. In *The German Advantage*, I point to the main safeguards upon which the Germans rely. First, there is constant adversary oversight,⁸⁰ which both deters judicial misconduct and facilitates appeal. Second, the system of appellate review is of central importance, both in deterring error below and in correcting it above.⁸¹ The German standard of review is astonishingly liberal—in the first appellate instance, there is review de novo. Appeals are heard by experienced panels, specialized by subject matter.⁸² Third, the judicial career is meant to embody "incentives for diligence and excellence. The idea is to attract very able people to the bench, and to make their path of career advancement congruent with the legitimate interests of the litigants."⁸³ The *Critique* leaves unanswered the discussion of adversary safeguard and appellate review, but the authors have collected a wheelbarrow of sociological muck to hurl at the German judiciary.

A. Judicial Selection

The authors fault *The German Advantage* for not adventuring among some German sociological writing about the judiciary. For exam-

⁷⁹ *Professor Is Charged with Lying for Maker of Birth Control Device*, N.Y. Times, Mar. 4, 1988, at 1, col. 1.

⁸⁰ See *supra* text accompanying note 1; *The German Advantage*, *supra* note 1, at 834-35, 845.

⁸¹ *Id.* at 855-57.

⁸² For an English-language account, see Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981).

⁸³ *The German Advantage*, *supra* note 1, at 848.

ple, the authors fret at the sociologists' discovery that the members of this learned profession tend to come disproportionately "from families of civil servants," to be more Catholic than the population at large, and to be "oriented" (whatever that means) "toward traditionally conservative and hierarchical groups such as clergymen" ⁸⁴

More seriously, the authors dispute a passage that I quoted from Manfred Wolf, a leading German writer on judicial administration, that "only the candidates with the best examination results have any chance of entering the judicial corps."⁸⁵ The authors strain to belittle this point, on the curious ground that, relative to the supply of new law graduates, the number of vacancies in the judiciary is small. The small number of places, they argue, is "the primary reason why the judiciary is now able to hire distinguished graduates," and not "the attraction of a high status career."⁸⁶ This unlikely conjecture about what motivates able young jurists to join the judiciary would, even if accepted for the sake of argument, scarcely detract from the significance of the phenomenon that the authors want to denigrate: The better German law graduates go disproportionately into the judiciary.

Straining to disparage the quality of recruits to the German bench, the authors make much of some 1972 survey data contained in a study (probably unpublished), whose revealing title is "Selfknowledge and Political Consciousness of Jurists."⁸⁷ The study reports on responses to a questionnaire that was sent to some German judges, and to a minute sample of lawyers. The respondents were asked to disclose their examination results, and the study tabulates the responses. The *Critique* reads the survey results to stand for the proposition that the law graduates with the higher examination grades did not unambiguously prefer the judiciary.⁸⁸ In truth, the sample employed in that study is highly suspect, which may explain why the study was unable to attract a publisher. The study suffers the familiar defects of poor questionnaire work. Many German judges feel that they have better things to do with their time than to respond to questionnaires from sociologists researching the supposed

⁸⁴ *Critique*, *supra* note 11, text at notes 212-15.

⁸⁵ *Id.*, text at note 224 (citing *The German Advantage*, *supra* note 1, at 849).

⁸⁶ *Critique*, *supra* note 11, text preceding note 224.

⁸⁷ *Id.* at note 220 and accompanying text (citing M. RIEGEL, R. WERLE, & R. WILDENMANN, SELBSTVERSTÄNDNIS UND POLITISCHES BEWUSSTSEIN DER JURISTEN [translation: SELF-KNOWLEDGE AND POLITICAL CONSCIOUSNESS OF JURISTS] (1974)). The *Critique* cites this work as though it were a book. The work is so obscure that (1) no copy exists in any of the hundreds of North American libraries whose holdings are included in the RLN and OCLC data bases; and (2) not one review of the work, German or otherwise, can be traced in the Index to Foreign Legal Periodicals. For cite checking, the *Critique*'s authors supplied photocopies of a title page and of several pages of discontinuous and largely unexplained computer-generated tables (which apparently tabulate responses to questionnaires), accompanied by typescript text. The title page discloses no publisher, and I infer that the study was not published in the ordinary sense. Accordingly, this is not work that has been subjected to conventional scholarly scrutiny.

⁸⁸ *Critique*, *supra* note 11, text at note 226.

political consciousness of the bench, with the result that the group that responded is scarcely likely to have been representative. This problem of unrepresentative data is especially acute within the study's tiny sample of practicing lawyers: The entire sample contains 132 responses, from lawyers who self-selected themselves from a group of only 215 who were solicited. Yet from this minuscule sample, the *Critique's* authors rush to trumpet the possibility "that the practicing bar, and not the judiciary, attracted a disproportionate number of the most highly qualified graduates."⁸⁹

A good indication that the *Critique's* authors are abusing the 1972 study is that Werle, one of the study's three authors, thinks that the data shows the opposite of what the *Critique* makes it stand for. Werle wrote in a 1977 book: "It is striking that, especially in the second state examination, the lawyers (*Anwälte*) performed worse than the judges and the law graduates going into governmental administration (*Verwaltungsjuristen*)."⁹⁰ Gerhard Köbler, writer of a prominent German introduction to legal studies, reports in the third edition of his book that as of 1981 judicial vacancies were being filled almost entirely with applicants from the top twenty percent of the examination class.⁹¹

The proposition that you need good examination results in order to join the bench is a truism in Germany, roughly comparable to the notion that the sun rises in the East. One needs to be very unsophisticated about the German legal system in order to attempt to controvert so basic a truth; and one needs to be very headstrong in order to rest such an attempt on a lone, obscure, and defective sociological survey.

The *Critique* canvasses some all-law-is-politics tracts of the early seventies and cites them for the proposition that Germans wish they had "'political' judges."⁹² The *Critique* thus continues to display its instinct for sampling error, in this instance accepting as gospel the discontents of German flower children.

Recall the proposition advanced in *The German Advantage*: that the effort to attract and to promote an able judiciary succeeds at a level sufficient to constitute a real safeguard for litigants. *The German Advantage* does not recommend importing the German bench. "I do not believe," the article says, "that we would have to institute a German-style

⁸⁹ *Id.*, text at note 232. The *Critique* makes much of the point that few people with grades in the two highest categories (*sehr gut, gut*) wound up on the bench, but that is because the absolute numbers of such grades were and always are extremely small.

⁹⁰ R. WERLE, JUSTIZORGANISATION UND SELBSTVERSTÄNDNIS DER RICHTER: EINE EMPIRISCHE UNTERSUCHUNG 55 (1977).

⁹¹ G. KÖBLER, DAS STUDIUM DES RECHTS: EIN WEGWEISER 237 (3d ed., 1982). The key sentence reads: "On account of the growing number of applicants, the examination grade necessary for admission [to the judicial corps] has risen (in 1981 almost entirely applicants with the grade of 'fully satisfactory' (*vollbefriedigend*) [or better]."⁹² *Id.* A table, *id.* at 114, shows that 20.3 percent of the 1980 examination grades were "fully satisfactory" or better.

⁹² *Critique*, *supra* note 11, text at notes 249-50.

career judiciary in order to reform American civil procedure along German lines"⁹³ Again: "[M]easures far short of adopting the Continental career judiciary can bring about material improvement."⁹⁴ Thus, the contention that Germans "express grave doubts about the model that Langbein extols"⁹⁵ is doubly misleading. I have not advocated wholesale adoption of a German-style bench, and the German literature is wholly devoid of admiration for American judicial selection practices. The common observation in Germany—that it would be nice if the people who staff the career bench could have broader life experience before they enter the bench—seems both sound and relatively trivial. It has tempted no one in Germany to yearn for American-style judicial selection.

Small wonder. In the very months when Ronald Allen, sitting in Chicago, was putting the finishing touches on the *Critique*, the local press was reporting the latest roundup of judicial thugs. In December 1987, four more circuit court judges were indicted for racketeering.⁹⁶ Simultaneously, the Texaco litigation was unfolding, bringing to national attention the corruption of campaign finance in the Texas bench.⁹⁷ Yet what impresses the authors of the *Critique* is that some Germans think that it would be a good idea for their judges to have broader pre-professional experience. I wish Americans had the luxury to worry about such matters.

B. Promotion

The *Critique* also declares itself mistrustful of the German effort to encourage judicial diligence through the promotion process. Ever ready to abandon its taste for empiricism when convenient, the *Critique* takes at face value another early-seventies tract, this one by a probationary judge who evidently washed out, became a sociologist, and wrote disparagingly of his former colleagues.⁹⁸

As usual, the *Critique* draws all inferences against the German system. Encouraging good caseload management becomes, in the eyes of the *Critique*, "docket clearing . . . at the expense of just resolution of cases."⁹⁹ The pride that the Germans take in encouraging judges to work within a predictable system of case law is dismissed contemptuously as "adhering in a narrow and technical fashion to the pronounce-

⁹³ *The German Advantage*, *supra* note 1, at 854.

⁹⁴ *Id.*

⁹⁵ *Critique*, *supra* note 11, text at note 236.

⁹⁶ *Greyhound Indictments Hit Suburban Court*, Chicago Tribune, Dec. 10, 1987, at 1, col. 2.

⁹⁷ "Lawyers representing Pennzoil [the plaintiff] contributed, from 1984 to early [1987], more than \$355,000 to the nine [Texas] Supreme Court justices sitting today One of those lawyers for Pennzoil had contributed \$10,000 to the lower-court judge who later presided at the start of the state-court trial in Houston." Petzinger & Solomon, *Quality of Justice: Texas Case Spotlights Questions on Integrity of the Courts in Texas*, Wall St. J., Nov. 4, 1987, at 1, col. 1.

⁹⁸ See *Critique*, *supra* note 11, text at notes 252-55.

⁹⁹ *Id.*, text preceding note 256.

ments of the higher courts"¹⁰⁰ Of course, if the German system had shown an opposite tendency, it would have been criticized for tolerating arbitrary power in the hands of inferior judges.

The German system of promotion takes account of peer evaluations by senior colleagues, as well as objective factors such as reversal rates and caseload management. Peer evaluations arise naturally from the collegial character of German courts. Not only the appellate courts, but also the basic first-instance courts for substantial matters, sit in chambers of three or more judges; and one judge serves as the presiding judge.¹⁰¹ The *Critique* denounces the use of peer evaluations, which have routine analogues in civil service careers and business careers everywhere, not to mention academic careers. Within the German judiciary, however, the authors think that peer review is "an instrument of power in the hands of the presiding judges," tempting junior judges "to defer to the views of the presiding judge"¹⁰² Oddly, no mention is made of the practice, reported in *The German Advantage*, that protects junior judges from abuse: "[T]he young judges are rotated through various chambers in the course of their careers, and this reduces the influence of an aberrant rating from any one presiding judge."¹⁰³

Incident to its castigation of the German bench, the *Critique* voices loud complaint about the narrowness of German case law,¹⁰⁴ a subject far removed from *The German Advantage*. English-language readers interested in this subject should consult the work of the great American comparative lawyer, John Dawson, which expresses an opposite concern—about the excessive creativity of German case law.¹⁰⁵

IX. CONCLUSION

The German Advantage was meant to inspire serious discussion about issues of great magnitude in civil procedure. I hardly expect universal agreement from American scholars on the superiority of principles that diverge so sharply from those that are familiar to us. A stimulating article by Samuel Gross, taking issue with *The German Advantage* on the question of whether the superior efficiency of German procedure is a de-

¹⁰⁰ *Id.*, text at note 256.

¹⁰¹ Although the first-instance Landgericht is collegial, the tendency of recent years has been to increase the responsibility of a single judge within the chamber for routine adjudication. See *The German Advantage*, *supra* note 1, at 827 n.13. For English-language discussion, in addition to the sources there cited, see A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 157-59 (2d ed. 1977).

¹⁰² *Critique*, *supra* note 11, text at note 265.

¹⁰³ *The German Advantage*, *supra* note 1, at 850.

¹⁰⁴ *Critique*, *supra* note 11, text at note 261.

¹⁰⁵ Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U.L. REV. 1039, 1095 (1983).

sideratum,¹⁰⁶ exemplifies constructive scholarly discourse and disagreement.

The trouble with the *Critique* is that it mirrors the vices of the legal system it volunteers to defend: It is a work of adversary distortion. It persistently misrepresents what *The German Advantage* says while misdescribing the reality of German procedure. In this reply, I have tried where possible to cite English-language literature, in order to allow readers who are not German-speaking the opportunity to confirm that the account of German procedure in *The German Advantage* is both accurate and conventional.

In deciding whether to write this reply, I took counsel in several quarters. The most worrisome advice came from a wise colleague on another law faculty, who said: "The trouble with replying to a work of distortion is that they can always distort afresh in a new round." I ask readers to learn from the first round that these authors are not trustworthy guides to the work of others, or to the reality of German procedure. Read *The German Advantage* for yourself; do not take these people's word for what it says; for as I have so often shown in this paper, it typically says something quite different.

Ronald Allen is not alone in feeling threatened by the model of German civil procedure. The German achievement calls into question fundamental premises of our deeply flawed system of civil procedure. It merits careful study, not the reckless trashing that these authors have undertaken.

¹⁰⁶ Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987).